

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 March 2006

CASE NO.: 2005-LHC-1769

OWCP NO.: 07-144509

IN THE MATTER OF

WILBERT JOHNSON JR. (Deceased)
Claimant

v.

ALNAR ENTERPRISES, INC.,
Employer

and

LOUISIANA WORKERS' COMPENSATION CORPORATION,
Carrier

APPEARANCES:

Geri B. Baloney, Esq.,
On behalf of Claimant

Travis R. LeBleu, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for dependent survivor benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, (2000) brought by dependents of decedent, Wilbert Johnson (Claimant) against Alnar Enterprises (Employer) and Louisiana Workers'

Compensation Corporation (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on January 13, 2006 in Covington, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Alfred Narcisse and Kendra Shears testified on behalf of Claimant who introduced 15 exhibits which were admitted, including birth certificates of Kendra Shears and Travis Shears; death certificate of Coretha Johnson; Claimant's burial expenses; Claimant's tax returns for 1993, 1994, and 1995; Claimant's pay check stubs and medical records and expenses.¹ Employer introduced 4 exhibits which were admitted including an obituary of Coretha Johnson; Claimant's tax and pay check stub records; and Claimant's responses to discovery. Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. On June 27, 1996, while employed by Employer to repair a barge, Claimant fell into the Mississippi River when a scaffold which he had previously welded and on which he was standing broke.
2. Claimant was taken to St. Charles Parish Hospital where he died on June 28, 1996 as a result of his injuries sustained due to the fall the previous day.
3. Employer was advised of the injury on June 27, 1996.
4. Claimant was never married and had one child, Kendra Shears.
5. On the date of Claimant's death, Kendra Shears who was a student, resided with, and was fully dependent upon Claimant. Claimant also had a grandson, Travis Shears, who was living with and fully dependent upon Claimant on Claimant's death. Coretha Johnson, mother of Claimant, was also living with and dependent upon Claimant at the time of his death.
6. Claimant filed a timely claim for benefits followed by a timely Notice of Controversion by Employer. (EX-4, pp. 15, 16).

¹ References to the transcript and exhibits are as follows: trial transcript- Tr.____; Claimant's exhibits- CX-____, p.____; Employer exhibits- EX-____, p.____; Administrative Law Judge exhibits- ALJX-____; p.____.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Average Weekly Wage.
2. Length of Dependency.
3. Attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant's mother, Coretha Bailey Johnson, was born on April 28, 1928 and died on June 10, 2003. (EX-1). The funeral home responsible for the burial services was Earl Baloney and Sons with funeral costs totaling \$9,958.00. (CX-5, 6; Tr.44-46).

Kendra Shears was born on November 30, 1975 and was 20 years old when Claimant died. Her child, Travis Shears was born on January 20, 1996. Coretha Johnson, Kendra Shears, and Travis Shears were all living with and fully dependent upon Claimant when he died. (CX-1, 2, 3, 4).

Claimant had a sporadic work history as a welder/fitter. In 1993 he made a total of \$9,171.00 working for A & N Repair Service. In 1994, he made \$18,362.76 working for Lombas Contractor, Inc., La. Local Contractors, Inc., (EX-2, CX-8, 9). In 1995, his earnings dropped to \$4,137.92 working for La. Local Contractors, Inc. and L'Homme, Inc. (CX-7). In 1996, Claimant worked for River Barge Cleaning, Inc., from April 15-28, 1996 and made \$655.25 for 56.5 regular hours and 4 hours of overtime. (CX-10). In May, 1996, Claimant began working for Employer. As of June 9, 1996, Claimant had earned \$1,610.50 averaging 50.5 hours per week or gross wages of \$557.50. (EX-3, CX-11, 12, 13; Tr. 23).

B. Testimony of Alfred Narcisse and Kendra Shears

Narcisse, who owned Employer and employed Claimant in 1996, testified he employed Claimant as a fitter and welder. Narcisse identified checks he issued to Claimant on a weekly basis starting on May 31, 1996 with Claimant working 50.5 hours on average per week making approximately \$11.00 per hour. (Tr. 14-21). Claimant's hourly wage was typical for welders doing the same type of work. (Tr. 22). Employer had plenty of work and worked every day with occasional overtime. (Tr. 24, 25).

Ms. Shears, who is the legal representative of Claimant's estate and that of her grandmother Coretha Johnson, testified she lived with her father when Travis was born and continued doing so until his death. Ms. Shears had no job and did not intend to get one. Rather, in agreement with Claimant she decided to first get a GED relying upon Claimant for support. (Tr. 34). Claimant regarded Travis as his own son and never indicated any intention to cease supporting him. (Tr. 35). Ms Shears testified as to the amount of funeral expenses incurred plus medical expenses associated with her father's death of \$9,621.35 which were paid from proceeds of her father's life insurance and for which she never received any reimbursement. (Tr. 45-48).

Ms. Shears on cross admitted that she had a court order of support for Travis's father, James Coleman of \$46.00 per week issued in 1997, but that the last support she received was in June, 2005 for \$29.61 with Coleman being 50% in arrears. (Tr. 49, 59, 61). She also admitted getting trade certificates from Job Corps in May, 1997, after which she performed a two month non paid internship of Charity Hospital and Harahan Guest House after which she worked in the Emergency Room of West Jefferson Hospital followed by work at a nursing home, and work at Rite Aide. (Tr. 50, 57). Currently Claimant has a GED and certificates as a health unit coordinator (ward clerk) and nursing assistant. (Tr. 51). As of November 15, 2005 Claimant was working full time making \$8.00 per hour with hours fluctuating between 24 to 45 hours per week. (Tr. 53-55). When Claimant finished her internship she was 22 years old. (Tr. 58).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends Kendra Shears as the daughter of decedent is entitled to 50% of Claimant's AWW of \$575.35 from the date of death, June 27, 1996 through August 15, 1997 when she finished school and obtained employment. Coretha Johnson as a dependent mother of Claimant is entitled to survivor benefits from June 27, 1996 through her death on June 10, 2003 with 8.3 % of AWW paid from June 27, 1996 through August 15, 1997 and 25% of AWW from August 16, 1997 through June 10, 2003. Travis Shears as a dependent grandchild is entitled to benefits of 8.3% of AWW from June 27, 1996 through August 15, 1997, and thereafter, 20 % of AWW apparently until age 18 or age 23 if Claimant remains a student. Claimant argues that the applicable AWW is \$537.00 as a 6 day a week worker with an average daily wage of \$93.00 x 300 divided by 52. Claimant also seeks funeral expenses of \$3,000, annual cost of living increases under Section 906 (b), plus unpaid medical expenses of \$9,621.35 under Section 907, attorney fees, and penalties under Section 914(e) and (f).

Employer concedes Coretha Johnson is entitled to survivor benefits from June 27, 1996, the date of Claimant death to June 10, 2003 when she died. Employer disputes the AWW and has refused to pay compensation without documentation as to the proper party to pay. Employer agrees that Kendra Shears is entitled to survivor benefits but only until May, 1997, when her student status ended and contests Claimant's AWW. Concerning Travis Shears, Employer contends his status as a dependent ended when his mother ceased being a student and that was the only reason he was ever a dependent citing Section 909 (d) of the 1972 amendments.

Employer argues AWW should be calculated based on Section 910 © using an average of Claimant's last three annual wages resulting in an AWW of \$199.10. Alternatively AWW should be based on a 40 hour week x \$10.00 per hour or to average out two checks (CX-10 and 11) of \$656.35 and \$557.50 and divide by 3 weeks they represent resulting in an AWW of \$404.58.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n., v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999). In this case I was impressed by the sincerity and frankness of both Alfred Narcisse, owner of Employer and Claimant's daughter, Kendra Shears.

C. Survivor Benefits

The primary and obvious issue present is the amount of compensation due admitted dependents, Kendra Shears, Travis Shears and Coretha Johnson. To answer that question one must look to Section 909 of the Act which reads in pertinent part as follows:

If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:(a) Reasonable funeral expenses not exceeding \$3,000.(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widower hood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each such child; in case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by

16 2/3 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.(c) If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages.(d) If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than 66 2/3 per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, and any other persons who satisfy the definition of the term "dependent" in section 152 of Title 26, but are not otherwise eligible under this section, 20 per centum of such wages for the support of each such person during such dependency and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between 66 2/3 per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.(e) In computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage as prescribed in section 906(b) of this title, but--(1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 906(b)(1) of this title; and(2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 910(i) of this title) occurs after the employee has retired, the total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.(f) All questions of dependency shall be determined as of the time of the injury.(g) Aliens: Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as

provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the injury, and except that the Secretary may, at his option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Secretary.

(underlining supplied)

Since there is no widow and Kendra Shears is the only dependent child involved she is entitled to 50% of Claimant AWW during her dependency as a student. Employer would terminate her benefits in May, 1997, when she finished formal job training instruction. However, as Counsel for Claimant pointed out Claimant's training did not finish until she completed her internship in August, 1997. As such she is entitled to 50% of Claimant's AWW from June 27, 1996 through August, 1997. During this period the remaining 16 2/3% of Claimant's AWW is to be divided proportionally between Travis Shears and Coretha Johnson according to Section 909 (d). From September, 1997, until Coretha Johnson's death on June 10, 2003, she would be entitled to 25% of Claimant's AWW. Travis would be entitled to 20 % of Claimant's AWW from September, 1997, until he reaches age 18 or older if he remains a student or is incapable of self support due to a mental or physical disability. Section 910 (f) also provides for annual cost of living increases for each dependent.

Employer argues without precedent that Travis Shears benefits should cease when his mother was no longer dependent but providing his support, which in this case would commence September, 1997. However, the Board in a recent decision, *Larry D. Henderson v. Kiewit Shea* _____ BRB _____ No. 05-0449 (January 31, 2006) found a dependent grandchild entitled to death benefits until he turned 18 or older if a student or wholly dependent upon the employee and incapable of self-support due to a physical or mental impairment.

Concerning AWW, Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000). Where neither Section 10(a) not Section 10(b) can be reasonably and fairly applied, Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Assoc., v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir. 1997); *Deewert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9th Cir. 2001) (finding

no support for the proposition that the time of the injury is when an employee stops working); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998). In occupational disease cases, the appropriate time for determining an injured workers average weekly wage earning capacity is when the worker becomes aware, or should have been aware, of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. § 910(i).

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. 33 U.S.C. § 910(a); *see also Ingalls Shipbuilding, Inc., v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000)(stating Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of “three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker. 33 U.S.C. §910(a). If this mechanical formula distorts the claimant’s average annual earning capacity it must be disregarded. *New Thoughts Fishing Co., v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp., v. Wright*, 155 F.3d 311, 327 (4th Cir. 1998). Section 10(a) is inapplicable since Claimant did not work substantially the whole of the year immediately preceding his injury.

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. §10(c); *Bunol*, 211 F.3d at 297; *Wilson*, 32 BRBS at 64. Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id.* To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee’s work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id.* at 130; *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991). Since the record contains no payroll records of similar employees, Section 10 (b) cannot be applied.

If neither of the previously discussed sections can be applied reasonably and fairly, then a determination of a claimant’s average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297-98; *Gatlin*, 936 F.2d at 821-22; *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

[S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in

the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426 (5th Cir. 2000) (finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980). In this case I find it appropriate to use Claimant's actual gross earnings from Employer as reflected in CX-11 showing an average of 50.5 hours per week at \$11.039 per hour for a total of \$557.50 per week. Employer's approaches underestimate both hours worked as well as Claimant's hourly rate of pay.

D. Medical and Funeral Benefits

Section 7(a) of the Act provides that the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require. 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima facie case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975) (stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

Claimant showed that he paid \$9,621.35 in medical expenses related to his injury for which he was not reimbursed. Employer never addressed this issue in its brief or offered evidence to refute the reasonableness or necessity of such treatment and is accordingly ordered to reimburse Claimant for said expenses. In like manner, Employer is ordered to reimburse Claimant the sum of \$3,000.00 in funeral expenses pursuant to Section 909 of the Act.

E Interest and Penalties

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. While Claimant would have me imposed penalties under Section 914 (e) and (f) I find no precedent or reason to do so for until this decision there has been no prior award.

F. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant's estate or to the legal representative of such estate medical expenses of \$9,621.35 which Claimant incurred and paid as a result of his June 26, 1996 injury pursuant to Section 907 of the Act as well as funeral expenses of \$3,000.00 associated with injury pursuant to Section 909 of the Act.

2. Employer shall pay to dependent Kendra Shears as the only child of Claimant 50% of Claimant's AWW (\$557.50) or \$278.75 per week from June 27, 1996 through August 1997. During this same time period Employer shall pay 16 2/3 % of Claimant's AWW or \$92.92 per week to be divided proportionally or 52.5% (\$48.78) between the estate and legal representative of Coretha Johnson and 47.5% (\$44.14) to the legal representative of minor Travis Shears according to Section 909 (d) of the Act.

3. Employer shall pay to the estate or legal representative of Coretha Johnson 25% of Claimant's AWW or \$139.38 per week from September 1997 to June 10, 2003 according to Section 909 (d) of the Act plus annual cost of living increases pursuant to Section 910 (f) of the Act.

4. Employer shall pay to the legal representative of minor Travis Shears 20% of Claimant's AWW or \$111.50 per week from September 1997 until he reaches age 18 or older if a student or incapable of self support due to a physical or mental disability pursuant to Section 909 (d) of the Act, plus annual cost of living increases pursuant to Section 910 (f) of the Act.

5. Employer shall pay Claimant's estate, Coretha Johnson's estate or their legal representatives, and Kendra Shears and the legal representative of minor Travis Shears' interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge